

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

03 SEP 25 PM 4:00
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES OF AMERICA

v.

CASE NUMBER: 8:03-CR-77-T-30TBM

HATIM NAJI FARIZ
_____ /

**DEFENDANT HATIM NAJI FARIZ'S MOTION
FOR GRAND JURY TRANSCRIPTS**

Defendant, HATIM NAJI FARIZ, by and through undersigned counsel, respectfully moves this Honorable Court, pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(ii), to allow Defendant to inspect the grand jury transcripts in the above-styled cause and as good grounds therefore would show:

- 1) Mr. Fariz was indicted in the above-styled criminal cause, pursuant to a multi-count Indictment that alleges, among other things, various RICO and other conspiracies.
- 2) The Indictment lists over two hundred alleged overt acts in furtherance of the alleged conspiracies.
- 3) The government has admitted that certain overt acts in which Mr. Fariz allegedly spoke to Mr. Awda are factually inaccurate as alleged in the Indictment.
- 4) Based upon the government's admission, the factual accuracy of the entire Indictment, and in turn the probable cause required for an indictment, is in question.
- 5) In order to file a motion to dismiss the Indictment for lack of probable cause, Mr. Fariz has a particular need to inspect those portions of the grand jury transcript which pertain to the charges against him.

254

6) Mr. Fariz's particularized need for grand jury transcripts outweighs the need, if any, for continued grand jury secrecy.

7) Mr. Fariz's present motion is structured to request only those portions of grand jury transcript necessary for purposes of filing his motion to dismiss.

MEMORANDUM OF LAW

Federal Rule of Criminal Procedure 6(e)(3)(E)(ii) permits disclosure of grand jury materials otherwise prohibited by Rule 6(e) where the defendant moves for disclosure and shows that a "ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Although Rule 6(e) does not set forth a standard by which courts may consider such motions, the Supreme Court has held that "a strong showing of particularized need" is required before disclosure is permitted. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 443-45 (1983); *see also In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami*, 833 F.2d 1438, 1441-42 (11th Cir. 1987) (requiring "particularized need"); *United States v. Cole*, 755 F.2d 748, 758-59 (11th Cir. 1985) (same).

To show particularized need, "a party seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed" *Douglas Oil Co. v. Northwest Petrol Stops Northwest*, 441 U.S. 211, 222-23 (1979); *see also United Kingdom v. United States*, 238 F.3d 1312, 1320-21 (11th Cir. 2001) (applying *Douglas Oil* requirements); *In re Request for Access to Grand Jury Materials*, 833 F.2d at 1441 (same).

The *Douglas Oil* standard is a "highly flexible one, adaptable to different circumstances," *United States v. Doe*, 481 U.S. 102, 112 (1987), and is applied on a "case by case basis, focusing on the circumstances involved in the case under review." *United States v. Noriega*, 917 F.2d 1543, 1547 n.6 (11th Cir. 1990); *see also In re Special Grand Jury 89-2*, 143 F.3d 565, 569 (10th Cir. 1998) (same).

As a preliminary matter, Mr. Fariz satisfies the basic requirement of Rule 6(e)(3)(E)(ii) that the transcripts must be needed in order to file a motion to dismiss. *See, e.g., United States v. Bullock*, 448 F.2d 728, 729 (5th Cir. 1971) (granting motion to disclose grand jury transcripts in order to afford defendant opportunity to file motion to dismiss). Disclosure pursuant to Rule 6(e) is the appropriate means through which a defendant must obtain evidence for a motion to dismiss based upon factual irregularities occurring before the grand jury. *See, e.g., United States v. Jacobson*, 691 F.2d 110, 116 (2nd Cir. 1982) (granting motion for grand jury transcripts in light of allegation that grand jury was misled as to the "quality of the evidence" upon which it indicted). As discussed in more detail below, Mr. Fariz needs grand jury transcripts in this case in order to substantiate a motion to dismiss the Indictment for lack of probable cause. Mr. Fariz's belief that probable cause is lacking is based upon the government's admission on the record in this case that it misidentified co-defendant Abd Al Aziz Awda as the person with whom Mr. Fariz was allegedly speaking in the telephone call which is the subject of Count 43 (Overt Act 253 of Count One) and that due to this misidentification, the references to Mr. Awda in Overt Acts 236, 240, and 247 of Count One are, as the government puts it "suspect." These three overt acts are the sole basis

for Counts 35, 37, and 41, respectively, against Mr. Fariz. Obviously, the grand jury indicted Mr. Fariz based upon erroneous information with respect to Count 43 and Count 1, and it likely indicted Mr. Fariz based upon erroneous information in Counts 35, 37, and 41.

Mr. Fariz's particularized need satisfies the stringent requirements of *Douglas Oil* and its progeny for disclosure of grand jury transcripts in this case.

I. Need to Avoid Possible Prejudice in Another Judicial Proceeding

First, the grand jury transcripts requested in his present motion are "needed to avoid a possible injustice in another judicial proceeding." *Douglas Oil*, 441 U.S. at 222-23. A federal grand jury may only indict a defendant upon being presented with probable cause that the defendant committed every necessary element of a federal criminal law. *United States v. Fern*, 155 F.3d 1318, 1324-25 (11th Cir. 1998) (citing Fifth Amendment due process right). In this case, the government has admitted¹ that it misidentified co-defendant Awda as a speaker in Overt Act 252 (Count 43), meaning the grand jury indicted Mr. Fariz based upon false information. The references to Mr. Awda (i.e., the evidence presented to the grand jury) in Overt Acts 236, 240, and 247 (Counts 35, 37, and 41) are, according to the government, "suspect."² *See Trans. of Status Proceedings before J. Pizzo*, April 8, 2003

¹ Because the government has admitted to the misidentification of co-defendant Awda, there is no question that Mr. Fariz presents substantiated allegations in support of his motion. *See, e.g., Cole*, 755 F.2d at 759 (unsubstantiated allegations do not satisfy particularized need standard).

² Furthering Mr. Fariz's need for grand jury transcripts is the fact that the government refuses to now identify to whom it now believes Mr. Fariz was speaking in overt acts 236, 240, 247, or 253. (*Status Trans.* at 10).

(hereinafter "Status Trans.") at 3-6. These admissions and concessions by the government seriously call into question the factual veracity of the *entire Indictment*. The Indictment alleges certain telephone conversations between Mr. Fariz and allegedly high-ranking members of the Palestinian Islamic Jihad ("PIJ"). If the government misinterpreted or mistranslated four of these telephone conversations, what others of the scores of conversations alleged in the Indictment did it incorrectly analyze - and thereby incorrectly present to the grand jury? If the government was mistaken as to the identity of a key person with whom, and about whom, Mr. Fariz allegedly spoke, it is also possible - if not likely - that the government (and by extension the grand jury) is also mistaken as to: 1) Mr. Fariz's identity as a participant in telephone calls, 2) the identities of other participants in telephone calls, and 3) the identities of others mentioned by actual participants in telephone calls. These admitted mistakes, and further potential errors, shake Mr. Fariz's, and the public's, confidence in the entire Indictment as it pertains to Mr. Fariz. Above all, it would be an injustice (resulting from a violation of Mr. Fariz's Fifth Amendment due process rights) to require Mr. Fariz to stand trial based upon an Indictment that lacks probable cause.

The prejudice is especially compelling in this Indictment, which charges multiple conspiracy counts in which Mr. Fariz is arguably legally responsible for the alleged conduct of all other co-conspirators. *See, e.g., United States v. Parrado*, 911 F.2d 1567, 1571 (11th Cir. 1990) ("It is axiomatic that a co-conspirator need not know all the details of the conspiracy and yet is responsible for the acts of his co-conspirators."). It is therefore essential that Mr. Fariz be permitted to inspect the grand jury transcripts to determine

whether other counts and overt acts attributed to him, either directly or through conspiracy theories, are factually accurate. Otherwise, incorrectly analyzed evidence presented to the grand jury with respect to overt acts that do not at first glance involve Mr. Fariz may nevertheless later wrongly implicate him in a criminal conspiracy.³

II. Need for Disclosure Greater than Need for Continued Secrecy

Second, Mr. Fariz's need for disclosure of grand jury materials is "greater than the need for continued secrecy." *Douglas Oil*, 441 U.S. at 222-23. The Supreme Court has recognized five reasons for grand jury secrecy:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

³ For example, overt act 72 of the Indictment alleges that Mr. Al-Arian "had a telephone conversation with [Mr. Awda], who was overseas, in which they discussed the passport problems of PIJ members and the in-fighting among various factions within the PIJ." If the government is incorrect with respect to the identity of either of the individuals speaking - as they are admittedly incorrect with respect to the identity of Mr. Awda in at least one other telephone call - that overt act might not count as conduct in furtherance of the conspiracy. Because Mr. Fariz, as an alleged co-conspirator, would arguably have been held legally accountable for the allegations in overt act 72, he has a vested interest in determining whether the grand jury was presented with factually inaccurate information concerning that paragraph, and, in turn, has a vested interest in the accuracy of the entire indictment, as it pertains to him.

Douglas Oil, 441 U.S. at 219 n.10 (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3rd Cir. 1954)). The interests in grand jury secrecy are reduced, though not eliminated, where the grand jury has ended its activities. *Id.* at 222; *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940) (“[A]fter the grand jury’s functions are ended, disclosure is wholly proper where the ends of justice require it.”).

The grand jury that indicted Mr. Fariz may no longer be empaneled, in which case the first three reasons for grand jury secrecy “are no longer of major concern.” *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261, 1274 (11th Cir.) (applying above factors and determining that movant’s need outweighed need for further grand jury secrecy), *cert. denied sub nom., Hastings v. Investigating Committee of the Judicial Council of the Eleventh Circuit*, 469 U.S. 884, and *reh’g denied*, 469 U.S. 1001 (1984). Even if the grand jury that indicted Mr. Fariz is still empaneled, the Court may alleviate any risks associated with the first three factors by inspecting *in camera* the grand jury transcripts, and redacting them as needed. Furthermore, with respect to the latter two justifications for further grand jury secrecy, any such concerns may be alleviated by the Court’s placing of restrictions upon the dissemination of the grand jury transcripts, such as that they not be disclosed to any person outside of the office of the undersigned Federal Public Defender.

Indeed, it is important to note that, with respect to the need (if any) for continued grand jury secrecy in this case, the Court may order the disclosure requested subject to a number of restrictions - all of which are agreeable to Mr. Fariz. Fed. R. Crim. P. 6(e)(3)(E) (“The Court may authorize disclosure - at a time, in a manner, and subject to any other

conditions that it directs ...”). The Court may, for example, 1) limit the time Mr. Fariz has access to the transcripts; 2) forbid the taking of the transcript from the secure facilities of the Federal Public Defender’s Office for the Middle District of Florida; 3) forbid dissemination of the transcript to *anyone* outside of those persons authorized by the Court to view it; and 4) require strict confidentiality with respect to the contents of the transcripts. *See, e.g., In re Petition to Inspect and Copy Grand Jury Materials*, 576 F. Supp. 1275, 1289 (S.D. Fla. 1983) (memorandum order granting motion for grand jury transcripts, with restrictions), *aff’d* 735 F.2d 1261 (11th Cir. 1984). Such restrictions will enable Mr. Fariz to adequately prepare his motion to dismiss the Indictment without the risk of public disclosure of grand jury materials. Should the Court decide it necessary, it may also review the grand jury transcripts *in camera* and disclose only those portions which pertain to, or are related to, Mr. Fariz’s case.⁴ *See, e.g., United States v. Plummer*, 941 F.2d 799, 806 (9th Cir. 1991) (affirming district court’s granting of limited access to grand jury transcripts, with limitations based upon particular portion’s relevance to defendant’s case).

Finally, Mr. Fariz's present motion is "structured to cover only material so needed" to support a motion to dismiss. *Douglas Oil*, 441 U.S. at 222-23. His request is narrowly tailored to include only those counts and paragraphs of the Indictment in which he is allegedly implicated in criminal activity, either directly or through an alleged conspiracy with co-defendants and others unnamed.

⁴ For example, Counts 45-50 do not pertain to Mr. Fariz’s case.

WHEREFORE, Defendant, Hatim Naji Fariz, respectfully moves this Honorable Court to grant his motion to inspect the grand jury transcripts in the above-styled criminal case.

Respectfully Submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER



Donald E. Horrox
Florida Bar No. 0348023
Assistant Federal Public Defender
400 North Tampa Street, Suite 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Facsimile: (813) 228-2562



Mark Rankin
Florida Bar No. 0177970
Assistant Federal Public Defender
400 North Tampa Street, Suite 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Facsimile: (813) 228-2562


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September, 2003, a correct copy of the foregoing has been furnished by hand delivery to Walter E. Furr, Assistant United States Attorney, 400 North Tampa Street, Suite 3200, Tampa, Florida 33602 and to the following by U.S. Mail:

Bruce G. Howie, Esquire
5720 Central Avenue
St. Petersburg, Florida 33707
(Attorney for Ghassan Zayed Ballut)

Daniel M. Hernandez, Esquire
902 North Armenia Avenue
Tampa, Florida 33609
(Attorney for Sameeh Hammoudeh)

Sami Amin Al-Arian #40939-018
Coleman USP
846 NE 54th Terrace
P.O. Box 1032
Coleman, Florida 33521
(Pro-Se)


Donald E. Horrox
Assistant Federal Public Defender